

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JACOB ANDERS CAMPBELL,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

NO. CV-12-0352-RHW

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 14, and Defendant's Motion for Summary Judgment, ECF No. 17. The motions were heard without oral argument. Plaintiff is represented by Lora Lee Stover. Defendant is represented by Assistant United States Attorney Pamela De Rusha and Special Assistant United States Attorney Lisa Goldoftas.

I. Jurisdiction

On April 9, 2010, Plaintiff Jacob Campbell filed both a Title II application for disability insurance benefits (DIB) and a Title XVI application for Supplemental Social Security Income (SSI). Plaintiff alleges that he has been disabled since December 17, 2008.

His application was denied initially on May 13, 2010, and again denied on reconsideration on September 29, 2010. A timely request for a hearing was made. On July 14, 2011, Plaintiff appeared in Spokane, Washington before Administrative Law Judge (ALJ) James W. Sherry. Thomas A. Polsin, vocational

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1 expert, also appeared at the hearing. Plaintiff was represented by attorney Lora
2 Lee Stover.

3 The ALJ found that Plaintiff was not disabled from December 17, 2008, the
4 date the alleged disability began, to August 12, 2011. Plaintiff timely requested
5 review by the Appeals Council, which was denied on March 23, 2012. The
6 Appeals Council's denial of review makes the ALJ's decision the final decision of
7 the Commissioner. 42 U.S.C. §405(h). Plaintiff timely filed an appeal with the
8 U.S. District Court for the Eastern District of Washington on May 15, 2012. The
9 instant matter is before the district court pursuant to 42 U.S.C. § 405(g).

10 **II. Sequential Evaluation Process**

11 The Social Security Act defines disability as the "inability to engage in any
12 substantial gainful activity by reason of any medically determinable physical or
13 mental impairment which can be expected to result in death or which has lasted or
14 can be expected to last for a continuous period of not less than twelve months."
15 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
16 under a disability only if his impairments are of such severity that the claimant is
17 not only unable to do his previous work, but cannot, considering claimant's age,
18 education and work experiences, engage in any other substantial gainful work
19 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

20 The Commissioner has established a five-step sequential evaluation process
21 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a)(4),
22 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987).

23 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
24 §§ 404.1520(b), 416.920(b). Substantial gainful activity is work done for pay and
25 requires compensation above the statutory minimum. 20 C.F.R. §§ 404.1574,
26 416.972; *Keyes v. Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is
27 engaged in substantial activity, benefits are denied. 20 C.F.R. §§ 404.1571,
28 416.920(b). If he is not, the ALJ proceeds to step two.

1 Step 2: Does the claimant have a medically-severe impairment or
2 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
3 claimant does not have a severe impairment or combination of impairments, the
4 disability claim is denied. A severe impairment is one that lasted or must be
5 expected to last for at least 12 months and must be proven through objective
6 medical evidence. 20 C.F.R. §§ 404.1508-09, 416.908-09. If the impairment is
7 severe, the evaluation proceeds to the third step.

8 Step 3: Does the claimant's impairment meet or equal one of the listed
9 impairments acknowledged by the Commissioner to be so severe as to preclude
10 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R.
11 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed
12 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the
13 impairment is not one conclusively presumed to be disabling, the evaluation
14 proceeds to the fourth step.

15 Step 4: Does the impairment prevent the claimant from performing work he
16 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant
17 is able to perform his previous work, he is not disabled. *Id.* If the claimant cannot
18 perform this work, the ALJ proceeds to the fifth and final step.

19 Step 5: Is the claimant able to perform other work in the national economy
20 in view of his age, education, and work experience? 20 C.F.R. §§ 404.1520(f),
21 416.920(f).

22 The initial burden of proof rests upon the claimant to establish a prima facie
23 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
24 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
25 mental impairment prevents him from engaging in his previous occupation. *Id.* At
26 step five, the burden shifts to the Commissioner to show that the claimant can
27 perform other substantial gainful activity. *Id.*

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III. Standard of Review

The Commissioner's determination will be set aside only when the ALJ's findings are based on legal error or are not supported by substantial evidence in the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992) (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla," *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance." *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the ALJ's denial of benefits if the evidence is susceptible to more than one rational interpretation, one of which supports the decision of the administrative law judge. *Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). "If the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ." *Matney*, 981 F.2d at 1019.

A decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are immaterial to the ultimate non-disability determination. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

IV. Statement of Facts

The facts have been presented in the administrative transcript and the ALJ's decision, and will only be summarized here.

At the time of the hearing, Plaintiff was 33 years old. He had separated from his wife, and had four minor children. He attended school through his freshman year and thereafter obtained his GED. He has an extensive and varied work history, including managing fast food restaurants, construction, welding and fabricating.

1 On 2008, Plaintiff fell on ice and injured his left knee. He underwent
2 surgery for a left knee lateral tibial plateau depression fracture in January, 2009.
3 He testified that his left knee pain is constant. He cannot cross his legs, kneeling is
4 impossible, and his knee seems to lock up.

5 He has been attending school for culinary arts, but withdrew because he had
6 two surgeries on his knee in 2010 and 2011. He had arthroscopic surgery in 2010,
7 where the doctor removed hardware, i.e. a screw and washer, from his previous
8 surgery. He also smoothed a tear in his meniscus. (Tr. 490, 492.) He continued to
9 have pain in his knee, so another surgery was performed. (Tr. 540.) He reported he
10 continued to have pain after this surgery. He continues to wear a brace and engage
11 in physical therapy. He takes Hydrocodone and Ibuprofen for pain. (Tr. 214.)

12 He testified he hoped to return to school in the fall of 2011.

13 **V. The ALJ's findings**

14 The ALJ found Plaintiff met the insured status requirements of the Social
15 Security Act through December 31, 2013. (Tr. 22.)

16 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
17 activity since December 17, 2008, the alleged onset date. (Tr. 22.)

18 At step two, the ALJ found Plaintiff had the following severe impairments:
19 status post open reduction internal fixation left tibial plateau fracture with
20 posterior lateral corner malunion, left knee meniscus tear, and posttraumatic lateral
21 compartment arthrosis of the left knee. (Tr. 22.)

22 At step three, the ALJ found Plaintiff did not have an impairment or
23 combination of impairments that meets or medically equals one of the listed
24 impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (Tr. 23.) The ALJ
25 considered whether Plaintiff met the listing for 1.02, major dysfunction of a joint
26 (Tr. 23.) The ALJ found Plaintiff did not meet the listing because he is able to
27 ambulate effectively as defined in the regulations. (Tr. 23.)

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1 The ALJ found Plaintiff has the residual functional capacity¹ to lift and/or
2 carry 20 pounds occasionally and 10 pounds frequently, to stand and/or walk for
3 two hours and sit for six hours in an eight-hour workday, to occasionally operate
4 foot controls with the left lower extremity, to occasionally climb ramps and stairs,
5 balance, stoop, and crouch, and never climb ladders, ropes or scaffolds, kneel, or
6 crawl, but should avoid concentrated exposure to extreme cold and excessive
7 vibration, and should avoid even moderate exposure to hazards such as
8 unprotected heights and use of moving machinery. (Tr. 23.)

9 At step four, the ALJ found Plaintiff not capable of performing past relevant
10 work as an assistant manager, fast food, fast food worker, fast food cook,
11 construction worker, sales clerk, short order cook, kitchen helper, food processor,
12 machine set-up mechanic, sandwich maker and store manager. (Tr. 26.)

13 At step five, the ALJ considered Plaintiff's age, education, work experience,
14 and residual functional capacity and found there are jobs that exist in significant
15 numbers in the national economy that Plaintiff can perform. Specifically, the ALJ
16 found that Plaintiff can perform the representative jobs of small parts assembler,
17 storage rental clerk, and cashier. (Tr. 27.)

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21 ¹"RFC is what an individual can still do despite his or her functional limitations
22 and restrictions caused by his or her medically determinable physical or mental
23 impairments. It is an administrative assessment of the extent to which an
24 individual's medically determinable impairment(s), including any related
25 symptoms, such as pain, may cause physical or mental limitations or restrictions
26 that may affect his or her capacity to perform work-related physical and mental
27 activities. . . RFC is the individual's maximum remaining ability to perform
28 sustained work on a regular and continuing basis: i.e. 8 hours a day, for 5 days a
week, or an equivalent work schedule. SSR96-6P.

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1 **VI. Issues for Review**

2 Plaintiff presents the following issues with respect to the ALJ's findings:

- 3 1. The ALJ erred in disregarding the opinions of Plaintiff's providers
4 regarding Plaintiff's condition.
- 5 2. The ALJ erred in assessing Plaintiff's residual functional capacities.
- 6 3. The ALJ failed to pose a proper hypothetical to the vocational expert.
- 7 4. The ALJ erred in assessing Plaintiff's credibility.
- 8 5. The evidence taken from the record as a whole does not support the
9 ALJ's decision that Plaintiff is not disabled.

10 **VII. Discussion**

11 **1. Consideration of Examining Physician's Opinion**

12 Plaintiff maintains the ALJ improperly evaluated the medical opinion of Dr.
13 William Shanks, the consultive examiner. He performed a one-time independent
14 examination of Plaintiff. Specifically, on February 9, 2010, Dr. Shanks referred
15 Plaintiff to an orthopaedic consult and opined that Plaintiff was severely restricted.
16 (Tr. 393.) ARNP Hendrickson treated Plaintiff and in February 4, 2010, indicated
17 that Plaintiff was capable of sedentary or light work. (Tr. 346.) On August 17,
18 2010, ARNP Hendrickson indicated that Plaintiff was capable of sedentary work
19 at that time. (Tr. 436.)

20 The ALJ gave ARNP Hendrickson's opinion significant weight and gave
21 Dr. Shanks' opinion limited weight because it was inconsistent with other
22 substantial evidence in the record, and because Dr. Shanks did not indicate which
23 level of work Plaintiff is capable of despite his standing, walking and lifting
24 restrictions. (Tr. 24-25.) In addition, the ALJ gave significant weight to the non-
25 examining state physicians who assessed a limited sedentary capacity. (Tr. 26.)

26 "When there is conflicting medical evidence, the Secretary must determine
27 credibility and resolve the conflict." *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th
28 Cir. 1992). More weight is given to a treating physician's opinion than to the

1 opinion of a non-treating physician because a treating physician is employed to
 2 cure and has greater opportunity to know and observe the patient as an individual.
 3 20 C.F.R. § 416.927(d)(1); *see also Andrews v. Shalala*, 53 F.3d 1035, 1040-41
 4 (9th Cir. 1995). Where the treating doctor's opinion is not contradicted by another
 5 doctor, it may be rejected only for "clear and convincing" reasons. *Lester v.*
 6 *Chater*, 81 F.3d 821, 820 (9th Cir. 1995). If the treating doctor's opinion is
 7 contradicted by another doctor, the ALJ may not reject this opinion without
 8 providing "specific and legitimate reasons" supported by substantial evidence in
 9 the record for doing so. *Id.* Similarly, greater weight is given to the opinion of an
 10 examining physician than a non-examining physician. *Andrews*, 53 F.3d at 1041.
 11 Opinions of physicians who examined the claimant only once should be given less
 12 weight than the physicians who treated her. 20 C.F.R. § 404.1527; *Benecke v.*
 13 *Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004). An ARNP is not an "acceptable
 14 source." 20 C.F.R. § 404.1513(a). Thus, the ALJ may not rely on ARNP
 15 Hendrickson's opinion to establish the existence of an impairment. *Id.* Even so,
 16 the ALJ may rely on her opinion to show the severity of Plaintiff's impairment and
 17 how it affects his ability to work. § 404.1513(d).

18 Here, the ALJ's rejection of Dr. Shanks' opinion was proper, given that
 19 other sources concluded that Plaintiff is capable of sedentary-type work activity.
 20 Dr. Shanks' opinion was given before two surgeries were performed to correct
 21 any limitations observed by Dr. Shanks. Specifically, ARNP Hendrickson and Dr.
 22 Lynch treated Plaintiff after Dr. Shanks evaluated Plaintiff. Given the nature of
 23 Plaintiff's impairment, it is appropriate to rely on later treatment notes to assess
 24 Plaintiff's residual function. The ALJ did not commit error. He gave specific and
 25 legitimate reasons for discounting Dr. Shanks' opinion, and these reasons are
 26 supported by substantial evidence in the record.

27 2. Credibility

28 Plaintiff argues the ALJ ignored the effects of pain from his physical

1 impairments, including how his pain would affect his ability to attend and
2 concentrate.

3 The ALJ rejected Plaintiff's and third-party statements concerning the
4 intensity, persistence and limited effects of these symptoms because Plaintiff
5 offered no explanation for the discrepancy between the objective findings and the
6 June 2011 medical notes² and his assertion of being able to stand for 30 minutes at
7 a time and sit for four minutes. (Tr. 25.) The ALJ also considered that Plaintiff
8 was active in a culinary arts program, requiring long periods of standing, and his
9 intention to continue on in that program. (Tr. 25.) The ALJ concluded that this
10 activity is consistent with at least sedentary-type work activity rather than not
11 being able to work at all. (Tr. 25.)

12 An ALJ's assessment of a claimant's credibility is entitled to "great weight."
13 *Anderson v. Sullivan*, 914 F.2d 1121, 1124 (9th Cir.1990). When there is no
14 evidence of malingering, the ALJ must give "specific, clear and convincing
15 reasons" for rejecting a claimant's subjective symptom testimony. *Molina v.*
16 *Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (citation omitted). If the ALJ's
17 credibility finding is supported by substantial evidence in the record, the
18 reviewing court "may not engage in second-guessing." *Thomas v. Barnhart*, 278
19 F.3d 947, 959 (9th Cir. 2002).

20 In recognition of the fact that an individual's symptoms can sometimes
21 suggest a greater level of severity of impairment than can be shown by the
22 objective medical evidence alone, 20 CFR 404.1529© and 416.929© describe the
23 kinds of evidence, including the factors below, that the ALJ must consider in
24 addition to the objective medical evidence when assessing the credibility of an
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26 ²The notes indicated that Plaintiff walked with a slight limp and had reasonably
27 good range of motion. There was no swelling, and he was assessed with left knee
28 pain. (Tr. 25.)

1 individual's statements:

2 1. The individual's daily activities; 2. The location, duration,
3 frequency, and intensity of the individual's pain or other symptoms;
4 3. Factors that precipitate and aggravate the symptoms; 4. The type,
5 dosage, effectiveness, and side effects of any medication the
6 individual takes or has taken to alleviate pain or other symptoms; 5.
7 Treatment, other than medication, the individual receives or has
8 received for relief of pain or other symptoms; 6. Any measures other
9 than treatment the individual uses or has used to relieve pain or other
10 symptoms (*e.g.*, lying flat on his or her back, standing for 15 to 20
11 minutes every hour, or sleeping on a board); and 7. Any other factors
12 concerning the individual's functional limitations and restrictions due
13 to pain or other symptoms.
14 SSR 96-7P, 1996 WL 374186.

15 Here, the ALJ provided clear and convincing reasons for his credibility
16 determination that were supported by substantial evidence. Notably, the Court has
17 reviewed the transcript and there is no testimony from Defendant regarding his
18 ability to attend and concentrate. Moreover, Plaintiff testified that he did not
19 experience any unwanted side effects from the pain medication he was currently
20 taken. (Tr. 55.)

21 3. Residual Functional Capacity

22 Plaintiff argues the ALJ erred in assessing his residual functional capacities.
23 He asserts the record does not support a finding that he is capable of performing a
24 restricted range of sedentary work where he would be required to sit for six hours
25 per day. He also argues the ALJ's hypothetical question did not fully represent
26 Plaintiff's physical impairments including his pain complaints.

27 As set forth above, the ALJ discounted Plaintiff's statements regarding his
28 limitations, and the Court found this was not error. Moreover, the ALJ's
determination of Plaintiff's residual functional capacity is supported by the record.
ARNP Hendrickson, Dr. Lynch, and the state examiners all concluded Plaintiff
can perform sedentary-type work. Additionally, the ALJ's hypotheticals to the
vocational expert were proper and supported by the record.

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1 **4. Failure to Call Orthopedist to Determine Whether Listing Is Met**

2 Plaintiff argues the ALJ failed to call an orthopedists to testify that Plaintiff
3 met or equaled Listing 1.06 because of his inability to effectively ambulate in
4 excess of 12 month period of time and/or his inability to bear weight on a
5 consistent basis. Listing 1.06 covers a fracture of the femur, tibia, pelvis, or one or
6 more of the tarsal bones with: (A) Solid union not evidence on appropriate
7 medically acceptable imaging and not clinically solid; and (B) Inability to
8 ambulate effective and return to effective ambulation did not occur or is not
9 expected to occur within 12 months of onset. 20 C.F.R. Part 404, Subpt. P, App.1,
10 § 1.06.

11 The ALJ did not consider Listing 1.06, but considered Listing 1.02. He
12 concluded Plaintiff's left knee impairment did not meet or medically equal listing
13 102A because Plaintiff is able to ambulate effectively as defined by the
14 regulations.³ (Tr. 23.) Listing 102A covers major dysfunction of a joint due to any
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16 ³1.00B.2.b defines "inability to ambulate effectively" as an extreme limitation
17 of the ability to walk; *i.e.*, an impairment(s) that interferes very seriously with the
18 individual's ability to independently initiate, sustain, or complete activities.

19 Ineffective ambulation is defined generally as having insufficient lower extremity
20 functioning (see 1.00J) to permit independent ambulation without the use of a
21 hand-held assistive device(s) that limits the functioning of both upper extremities.

22 The regulations explain that to ambulate effectively, individuals must be
23 capable of sustaining a reasonable walking pace over a sufficient distance to be
24 able to carry out activities of daily living. They must have the ability to travel
25 without companion assistance to and from a place of employment or school.
26 Therefore, examples of ineffective ambulation include, but are not limited to, the
27 inability to walk without the use of a walker, two crutches or two canes, the
28 inability to walk a block at a reasonable pace on rough or uneven surfaces, the

1 cause, which is characterized by gross anatomical deformity and chronic joint pain
2 and stiffness with signs of limitation of motion or other abnormal motion of the
3 affected joints and findings of joint space narrowing, bony destruction and
4 ankylosis of the affected joint with involvement of one major peripheral weight-
5 bearing joint (i.e. hip, knee, or ankle) resulting in an inability to ambulate
6 effectively. 20 C.F.R. Part 404, Subpt. P, App.1, § 1.02A.

7 The ALJ has a special duty to fully and fairly develop the record. *Webb v.*
8 *Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). Where it is necessary to enable the
9 ALJ to resolve an issue of disability, the duty to develop the record may require
10 consulting a medical expert. *See* 20 C.F.R. §§ 404.1519a, 416.919a; *Reed v.*
11 *Massanari*, 270 F.3d 838, 842 (9th Cir. 2001).

12 Here, the ALJ did not state, nor does the record reflect, that the medical
13 evidence was ambiguous or that the record was otherwise inadequate to allow for
14 proper evaluation of Plaintiff's disability. Plaintiff has not cited to any portion of
15 the record that indicates that Plaintiff was not able to ambulate effectively. Rather,
16 the record supports a finding that Plaintiff meets the definition for effective
17 ambulation found in the regulations. From the record, it can be inferred that
18 Plaintiff is able to ambulate effectively to school, without companion assistance.
19 The record demonstrates that Plaintiff is able to carry out activities of daily living.⁴
20 As such, it was not necessary for the ALJ to consult a medical expert. The ALJ did
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22 inability to use standard public transportation, the inability to carry out routine
23 ambulatory activities, such as shopping and banking, and the inability to climb a
24 few steps at a reasonable pace with the use of a single hand rail. The ability to
25 walk independently about one's home without the use of assistive devices does
26 not, in and of itself, constitute effective ambulation.

27 ⁴Plaintiff testified that he shops, cleans for up to 20 minutes, and takes care of
28 his children when they stay with him.

1 not err in obtaining the opinion of a medical expert regarding whether Plaintiff
2 met Listing 1.06.

3 **VIII. Conclusion**

4 Plaintiff has not met his burden of showing the ALJ committed legal error,
5 or that his conclusion that Plaintiff was not disabled from December 17, 2008 to
6 August 12, 2011, is not supported by substantial evidence. The ALJ properly
7 found that Plaintiff was capable of performing the requirements of representative
8 occupations such as small parts assembler, storage rental clerk, and cashier.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment, ECF 14, is **DENIED**.

11 2. Defendant's Motion for Summary Judgment, ECF No. 17, is
12 **GRANTED**.

13 3. The decision of the Commissioner denying benefits is **affirmed**.

14 4. The District Court Executive is directed to enter judgment in favor of
15 Defendant and against Plaintiff.

16 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
17 file this Order and provide copies to counsel, and **close the file**.

18 **DATED** this 29th day of October, 2013.

19
20 *s/Robert H. Whaley*

21 ROBERT H. WHALEY
22 United States District Judge

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